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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 74-1318

DREW MUNICIPAL SEPARATE SCHOOL DISTRICT, et al., *Petitioners,*

vs.

KATIE MAE ANDREWS, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE CHILD WELFARE LEAGUE OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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Table of Contents

	Page
Interest of Amicus Curiae	1
Introduction and summary of argument	3
Argument	6
I. Millions of children will be directly affected by the outcome of this case	6
II. Barring parents from employment may impose irreparable injury on their children	8
III. The consequences to children of the Drew School District rule, as described in this brief, violate national laws and policies	10
IV. Children of unwed parents have an independent right to privacy which is infringed by the Drew School District rule	14
V. The harms suffered by children as a result of the Drew School District rule serve to demonstrate that the rule violates the rights of the children to equal protection of the law	20
Conclusion	24

Table of Authorities Cited

Cases

Eisenstadt v. Baird, 405 U.S. 438 (1972) 15
Estin v. Estin, 334 U.S. 541 (1948) 19

Ginsberg v. New York, 390 U.S. 629 (1968) 13
Gomez v. Perez, 409 U.S. 535 (1973) 21
Goss v. Lopez, 419 U.S. 565 (1975) 19
Griswold v. Connecticut, 381 U.S. 479 (1965) 13, 15

In re Woodward's Estate, 230 Cal.App.2d 113, 40 Cal.Rptr. 781 (1964) 3

Jiminez v. Weinberger, 417 U.S. 628 (1974) 21

Labine v. Vincent, 401 U.S. 532 (1971) 21
Levy v. Louisiana, 391 U.S. 68 (1968) 21
Loving v. Virginia, 388 U.S. 1 (1967) 15

May v. Anderson, 345 U.S. 528 (1953) 13
Merriken v. Cressman, 364 F. Supp. 913 (E.D. Pa. 1973) .. 17
Meyer v. Nebraska, 262 U.S. 390 (1923) 13, 15

New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973) 11, 12, 21

Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971) 22, 23
Pierce v. Society of Sisters, 268 U.S. 510 (1925) 15
Prince v. Massachusetts, 321 U.S. 158 (1944) 13, 15

Roe v. Ingraham, 480 F.2d 102 (1973) 17
Roe v. Wade, 410 U.S. 113 (1973) 15, 16
Rosado v. Wyman, 397 U.S. 397 (1970) 8

Skinner v. Oklahoma, 316 U.S. 535 (1942) 13, 15
Stanley v. Georgia, 394 U.S. 557 (1969) 16, 17
Stanley v. Illinois, 405 U.S. 645 (1972) 5, 14, 21

Truax v. Raich, 239 U.S. 33 (1915) 4

Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) 21, 22, 23, 24

Rules

Supreme Court Rules:
Rule 42(3) 1

Statutes

Pages

Title VII, Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq. 4, 22, 23

Social Security Amendments of 1972:
42 U.S.C. §§ 601, 608(f) 13
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Page

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BRIEF OF THE CHILD WELFARE LEAGUE OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE[1]

For over fifty years, the Child Welfare League of America has been an advocate for children, devoting its efforts to the improvement of care and services for deprived, neglected and dependent children. The League is a non-sectarian federation of almost 400

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[1] A motion for leave to file this brief *Amicus Curiae*, pursuant to Supreme Court Rule 42(3), has been filed with the Clerk of this Court under separate cover.

child welfare agencies in the United States and Canada. It provides leadership and services to the child welfare field, and serves as a national clearinghouse and forum for exchange of knowledge and experience. It acts as a coordinator, a catalyst, and an advocate.

Almost all League affiliates provide direct services for children, services that reinforce the ability of parents to meet the child's needs, services that supplement the care which the child receives from parents, and services that substitute for parental care when necessary. Among the many services provided by affiliates are services for children in their own homes, protective services, shelter care, day care, homemaker services, foster family care, group home care, institutional care, residential treatment for emotionally disturbed children, adoption services, day treatment, maternity homes and services for unmarried parents. In addition, the League itself conducts research, provides consultation to agencies and communities, provides information for public education, organizes annual regional conferences, and publishes a monthly journal, *Child Welfare,* a quarterly *CWLA Newsletter,* and numerous pamphlets and leaflets.

The League also has initiated and sponsored numerous special projects, including the Foster Parent Project and the Adoption Resource Exchange of North America. It has assumed administrative responsibility for the Consortium on Early Childbearing and Childrearing, a task force of agencies within the U.S. Department of Health, Education, and Welfare devoted to helping communities implement programs which enable teenage girls who are parents to stay in school, and which provide them with health and social services.

Amicus has traditionally been concerned with improving conditions of child life and promoting the opportunities that are essential to the health and well-being of children. *Amicus* has reviewed the arguments of Petitioners, Respondents, and other *Amici* herein, and concludes that no other party will adequately present to this Court the deleterious impact upon children of the challenged rule. While the harm to children is not directly at issue herein, the interests of children are directly affected by the result. *Amicus* believes that it is particularly qualified to bring these interests to the attention of this Court and that this case should not be decided without an understanding of how the challenged rule affects children. It is this issue alone that *Amicus* addresses in its brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

There are no illegitimate parents, only illegitimate children.[2] In this brief, *Amicus* will argue that the impact of the rule imposed by Superintendent Pettey of the Drew Municipal Separate School District has the effect, as described in the Old Testament, of "visiting the iniquity of the fathers upon the children,"[3]

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[2] *But see, In re Woodward's Estate,* 230 Cal.App.2d 113, 40 Cal.Rptr. 781, 784 (1964).

[3] *Exodus* 20:5.

and is for that reason a rule which deprives "illegitimate" children, as much as their parents, of rights protected by the Constitution and acknowledged by this Court.

In this society, the jobs people hold affect virtually every aspect of their lives. Income from employment directly determines the quality of life, affecting many of its components, such as housing, medical care, nutrition and education. Barriers to employment adversely affect not only the worker but the worker's family, especially the children. This Court has repeatedly affirmed the right of persons in this society to make a living through employment,[4] and the Congress has repeatedly declared that it is the policy of this nation not only to outlaw barriers to employment[5] but to encourage everyone to work if possible.[6]

As this brief will show, unwed parents are more likely to be poor than are parents who have been married. Moreover, each year there are greater numbers of unwed parents than ever before. Hence, greater and greater numbers of children will be affected by rules or policies such as the rule in the present case, and those children will inevitably bear the consequences of living in a home where their parents are not only likely to be unemployed, but are actually precluded from seeking work for which they have been trained.

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[4]*E.g., Truax v. Raich,* 239 U.S. 33, 41 (1915).

[5]*E.g.,* Title VII, Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*

[6]*See, e.g.,* Social Security Amendments of 1972, 42 U.S.C. §§602a(5)(A),(8)(A)(ii), and (19); §630 *et seq.*

It hardly need be said that the impact on a child of living in a home in which the child's parent is unemployed can be severe. In addition to the problems of inadequate nutrition, medical care, clothing and housing, the lack of gainful employment for an unwed parent who, as a result, cannot adequately support her children can lead to the breakup of the family itself. Such a consequence violates strong policies expressed many times by this Court as well as by the U.S. Congress. The "importance of the family" emphasized in these policies is as great if the parent is unmarried as it is if a marriage ceremony has taken place. *Stanley v. Illinois,* 405 U.S. 645, 651 (1972).

The Drew School District's rule also violates the strong policy, enunciated by this Court on many occasions, of protecting the privacy of persons against unwarranted governmental intrusion. Were it not for that rule, the public might never learn of the marital status of the parents. Furthermore, the right of privacy extends to the children who may more easily be harmed by the stigmatizing designation of "illegitimacy" than may the parents. Indeed, the children may not themselves have any reason to know of their parent's marital status until the issue becomes a matter of concern to the parent's employer or potential employer. Invasions of privacy of this sort have repeatedly been struck down by this Court, and the same should be done here.

In view of the harmful and unlawful impact of the rule under consideration in this case, *Amicus* believes that although the children whose interests are the

concern of this brief are not actually parties to this action, their interests are so inextricably intertwined in the case that the decisions which this Court has issued within the past decade regarding the rights under the Equal Protection Clause of children whose parents are unwed should apply with equal force in this case. *Amicus* believes that the discrimination against unwed parents, to which the Drew School District rule is expressly addressed, is actually and inescapably discrimination against the children of those parents and that such discrimination cannot be constitutionally countenanced by this Court.

ARGUMENT

I. MILLIONS OF CHILDREN WILL BE DIRECTLY AFFECTED BY THE OUTCOME OF THIS CASE

In the decade from 1961 to 1971, enough children were born in the United States of parents who were not married to populate the entire city of Los Angeles.[7] In fact, more than one child of every eight children born in America in 1973 had unmarried parents.[8] Furthermore, from 1951 to 1970, not only has the whole number of such births increased each year,

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[7]SUBCOMMITTEE ON FISCAL POLICY, JOINT ECONOMIC COMMITTEE, 93d CONG., 1st SESS., STUDIES IN PUBLIC WELFARE, Paper No. 12 (Part II), *The Family, Poverty, and Welfare Programs: Household Patterns and Government Policies,* Krause, "Child Welfare, Parental Responsibility, and the State," at 256 (Joint Comm. Print 1973).

[8]HEW, PUBLIC HEALTH SERVICE, HEALTH RESOURCES ADMINISTRATION, 23 *Monthly Vital Statistics Report,* No. 11, "Summary Report, Final Natality Statistics 1973," Tables 8 and 11, at 9 and 11 (Jan. 30, 1975).

but also the ratio of such births to the total has similarly increased annually.[9] In 1973, for example, 407,300 such children were born, an increase of approximately 1% over 1972[10] (during which time the national birthrate actually declined by nearly 5%).[11] "Illegitimacy" is an ever increasing fact of life in America.

A further fact of life is that the families to which such children are born are predominantly poor. According to a recently reported study, approximately 60% of white and 80% of non-white children born to unwed women in the period from 1964 to 1966 were poor or near-poor.[12] Furthermore, according to the same study, eight times as many low-income white women had births out of wedlock as did non-poor white women, and three times as many low-income non-white women had such births as did non-poor, non-white women.[13] These figures demonstrate that the burden of a rule which bars employment of those who have children out of wedlock falls most heavily on those who require the greatest—not the least—opportunities for employment.

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[9]HEW, PUBLIC HEALTH SERVICE, HEALTH RESOURCES ADMINISTRATION, *Vital Statistics of the United States,* Vol. I, "Natality," 1971, Table I-29 at 1-27 (1975).

[10]HEW, PUBLIC HEALTH SERVICE, HEALTH RESOURCES ADMINISTRATION, 23 *Monthly Vital Statistics Report,* No. 11, "Summary Report, Final Natality Statistics 1973," at 4 (Jan. 30, 1975).

[11]*Id.* at 1.

[12]SUBCOMMITTEE ON FISCAL POLICY, JOINT ECONOMIC COMMITTEE, 93d CONG., 1st SESS., STUDIES IN PUBLIC WELFARE, Paper No. 12 (Part I), *The Family, Poverty, and Welfare Programs: Factors Influencing Family Instability,* Cutright, "Illegitimacy and Income Supplements," at 113 (Joint Comm. Print 1973).

[13]*Id.* at 114.

II. BARRING PARENTS FROM EMPLOYMENT MAY IMPOSE IRREPARABLE INJURY ON THEIR CHILDREN

When a parent cannot find work, regardless of her marital status, the impact of her lack of income falls heavily upon her children. Even if the parent seeks public assistance, there is no guarantee that there will be enough family income to provide adequately for the children. In the present case, for example, plaintiff Rogers was earning $250.00 per month before she was discharged and plaintiff Andrews would have been paid $450.00 per month had she been hired.[14] At the same time, a single, unemployed mother with one child in Mississippi received *annual* AFDC benefits of $360.00 and *annual* food stamp benefits of $760.00.[15]

Congress has recognized, as has this Court,[16] that public assistance benefits for children are not at the level at which such benefits are needed. According to a report made to Congress in 1967, "[n]owhere do public welfare payments bring the incomes of the poor who receive them even up to poverty levels."[17] In 1972, amendments were made to the Social Security

[14] *See*, 371 F. Supp. 27, 29, 30.

[15] SUBCOMMITTEE ON FISCAL POLICY, JOINT ECONOMIC COMMITTEE, 93d CONG., 1st SESS., STUDIES IN PUBLIC WELFARE, Paper No. 15, *Welfare in the 70's: A National Study of Benefits Available in 100 Local Areas*, Table 53, at 173 (Joint Comm. Print 1974).

[16] *Rosado v. Wyman*, 397 U.S. 397 (1970).

[17] HOUSE COMMITTEE ON WAYS AND MEANS, 90th CONG., 1st SESS., *Hearings on Social Security Amendments of 1967*, "AFL-CIO Dept. of Social Security Background Statement on Social Security and Welfare," 590 (1967), cited in H. Krause, *Illegitimacy: Law and Social Policy*, 269 (1971).

Act in order "to provide [needed] increases in benefits."[18] Moreover, in Mississippi, in 1972, AFDC benefits were the lowest of all reporting states in the nation.[19] Thus, an absolute bar to employment such as has been created by the Drew School District rule, especially at a time when the availablity of jobs in the economy is in a sharp decline,[20] almost inevitably will result in forcing reliance on public assistance benefits—benefits which do not even approach meeting a family's needs.[21]

It can hardly be doubted that the burden of inadequate financial assistance for a family will fall most heavily on the family's children. For example, children from poor families are much more likely to evidence ill health than are children from families with

[18] HOUSE COMMITTEE ON WAYS AND MEANS, 92d CONG., 2d SESS., *Report No. 92-231*, U.S. Code Cong. and Adm. News 4989 (1972).

[19] HEW, SOCIAL AND REHABILITATION SERVICE, NATIONAL CENTER FOR SOCIAL STATISTICS, *NCSS Report A-2*, "Public Assistance Statistics, December, 1974" (April, 1975). *See*, Tr. p. 67—March 20, 1973—Katie Mae Andrews.

[20] From an average national unemployment rate in 1970 of 4.9% (9.3% for Black females), unemployment rates have climbed sharply until, today, the national rate is 8.3% (13.8% for Black females). *Compare* U.S. DEPT. OF LABOR, *Manpower Report of the President*, Table A-12, at 219 (April, 1971), *with* U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, "The Unemployment Situation: November 1975," Press Release No. USDL 75-695, *and*, U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, 22 *Employment and Earnings* No. 5 (November 1975).

[21] Witnesses at trial testified repeatedly concerning the unavailability of suitable employment in Drew, Mississippi, and the impact of that fact upon their families. *See, e.g.*, Tr. pp. 13-14—March 20, 1973—Betty Barnes; Tr. pp. 22-23, 29-30—March 20, 1973—Violet Burnett; Tr., pp. 36, 39, 42-43, 46, 48—March 20, 1973—Lestine Rogers; Tr., pp. 55-56, 64—March 20, 1973—Katie Mae Andrews.

more adequate financial resources.[22] This is hardly surprising in view of the fact that children from low-income families often suffer from malnutrition with its attendant harms.[23] In summary, available evidence strongly supports what are surely by now, a decade after the inception of the federal "War on Poverty," self-evident propositions: that to be unemployed is to be poor, and to be poor is to live a life of ill-health. Poverty diminishes the quality of life for everyone who endures it, but its effects are most serious and long-lasting for growing children.

III. THE CONSEQUENCES TO CHILDREN OF THE DREW SCHOOL DISTRICT RULE, AS DESCRIBED IN THIS BRIEF, VIOLATE NATIONAL LAWS AND POLICIES

The rule of the Drew School District increases the likelihood that unwed mothers will be unable to find employment at all.[24] As has been shown, the rule thus

[22] "We have sufficient knowledge about the adverse effects of environments associated with low social and economic status to indicate that there is an urgent need for massive programs to meet the health and developmental needs of children being reared in widely different environments during the critical first years of life." *Lengthening Shadows, A Report of The Council on Pediatric Practice of The American Academy of Pediatrics on the Delivery of Health Care to Children,* at 32 (1970).

[23] *See, e.g., The Food Stamp Certification Handbook,* USDA Food and Nutrition Service, at 1 (August, 1974) (describing "low-income households whose limited food purchasing power contributes to hunger and malnutrition among members of such households."). "Associated with childhood undernutrition is an increased mortality, an increased morbidity for various infections, growth failure and possible permanent retardation of intellectual function." Chase, H. P. & Martin, H. P., *Undernutrition and Child Development,* 282 THE NEW ENGLAND JOURNAL OF MEDICINE, No. 17, at 934 (1970).

[24] See note 21, *supra.*

has a direct and adverse impact on the children of those mothers whom it affects. In quite similar circumstances, this Court has looked behind the language of a statute which, by its terms, conditioned public assistance benefits upon the marital status of parents, to declare unconstitutional the resulting discriminatory denial of equal protection to the children of those parents who were unwed. *New Jersey Welfare Rights Organization v. Cahill,* 411 U.S. 619 (1973). The words of this Court in that case are certainly applicable here: "[T]here can be no doubt that the benefits extended under the challenged program are as indispensable to the health and well-being of illegitimate children as to those who are legitimate." 411 U.S. at 621.

In *Cahill,* unmarried parents were denied public assistance benefits. Here, unmarried parents are denied jobs. The consequences to the children of those parents in *Cahill,* as here, will be direct and inescapable, and this Court had no hesitation in striking down precisely such discrimination in the *Cahill* decision. There is and could be no suggestion here, as there was not and could not have been in *Cahill,* that the children who are discriminated against under the rule of the Drew School District are somehow less deserving or less in need of adequate food, shelter, clothing and medical care. Hence, the mere fact that the rule here is on its face directed against parents rather than children cannot insulate the rule from the holding of *Cahill* nor from the strictures of the Equal Protection Clause. For this Court to hold otherwise

would be to elevate form over substance in a manner which the *Cahill* decision does not permit.

An additional consequence flows from the rule under consideration which, while it does not so clearly violate a decision of this Court, nevertheless violates well-established national policies. The laws of many states provide that children in low-income families may be declared "neglected" and thereby removed from the home simply because the families are poor:

> Sixteen states still allow poverty to be an explicit basis for declaring a child neglected. The word poverty is rarely used, however; "destitution" is the favored phrase. . . . In addition, fourteen states indirectly authorize intervention on the basis of family poverty because they list failure to provide support, education or medical care as a basis for a neglect finding and do not provide that lack of financial means may serve as a defense to any state intervention or to removal of the child. Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases,* 63 Geo.L.J. 887, 926 (1975) (footnotes omitted).

Furthermore, in addition to the possible involuntary loss of their children through child neglect proceedings, some unwed mothers might feel constrained to give up their children for adoption if retaining the children in their homes meant that opportunities for employment would be substantially curtailed.

Any such consequences which resulted in an increased likelihood that children would not live with their natural parent violates national as well as widely

established state policies which declare that the maintenance of the natural family ties are a paramount concern of society.[25] For example, the Texas Family Code provides that one of the principal purposes of the law is "to provide for the care, the protection, and the wholesome moral, mental and physical development of children . . . , in a family environment whenever possible, separating the child from his parents only when necessary. . . ." Texas Family Code §51.01 (1973). Moreover, decisions of this Court have long accorded the most solicitous protection to the integrity of the natural family.[26]

In 1972, in a decision which has significant implications for the present action, this Court reviewed the extensive litany of prior cases and concluded:

> The Court has frequently emphasized the importance of the family. . . .

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[25] *See,* 9 FAMILY L.Q., No. 1, at 52-53 (1975); HEW, WELFARE ADMINISTRATION, CHILDREN'S BUREAU, "Standards for Juvenile and Family Courts" at 81 (1966); 42 U.S.C. §§601, 608(f).

[26] *See, e.g., May v. Anderson,* 345 U.S. 528, 533 (1952) (a mother's right to the custody of her child is ". . . far more precious . . . than property rights. . . ."); *Ginsberg v. New York,* 390 U.S. 629, 639 (1968); (". . . constitutional interpretation has consistently recognized . . . the rearing of children is basic in the structure of our society . . ."); *Prince v. Massachusetts,* 321 U.S. 158, 165 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923) (the term "liberty" used in the Fourteenth Amendment denotes ". . . the right of the individual to marry, establish a home, and bring up children. . . ."); *Griswold v. Connecticut,* 381 U.S. 479, 495 (1965) (Goldberg, J., conc., joined by Warren, J. and Brennan, J.) (the rights ". . . to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected. . . ."); *Skinner v. Oklahoma,* 316 U.S. 535, 541 (1942) ("basic civil rights of man").

> . . . It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." *Stanley v. Illinois,* 405 U.S. 645, 651 (1972) (citation omitted).

Stanley makes explicit what was clearly implicit in prior decisions of this Court: that the familial relationship has been granted great deference by this Court because such a relationship affects "the important interests of *both parents and child.*" 405 U.S. at 657 (emphasis added). Thus, *Stanley* recognizes what *Amicus* would stress here: that maintaining the ties of the natural family is important for the children as much, or more, than for the parents. *Stanley,* of course, is important here for another reason as well. As here, the children in *Stanley* about whom this Court expressed concern were "illegitimate." This Court should refuse here, as it did in *Stanley,* to countenance discrimination which directly affects the well-being of such children.

IV. CHILDREN OF UNWED PARENTS HAVE AN INDEPENDENT RIGHT TO PRIVACY WHICH IS INFRINGED BY THE DREW SCHOOL DISTRICT RULE

It is obvious that the Drew School District rule infringes the right of privacy of employees or potential employees. What should not be overlooked is the impact of the rule upon the separate—but equally

important—interests of their children. As the District Court below correctly observed, the rule requires investigation into the parental status of school employees and prospective applicants and into the circumstances surrounding the birth of their children. 371 F. Supp. 27, 34. Pursuant to the rule, a school district, or other employer, is empowered to make inquires into highly personal and sensitive matters which may have been previously within the knowledge of the parent alone. Not only does this investigatorial activity itself unnecessarily intrude upon the privacy interests of both child and parent, the subsequent public action taken by the school district on the basis of the information uncovered publicly proclaims the "illegitimacy" of the affected child and may well result in the creation of a stigma upon the child where none previously existed.

In recent years, the right of privacy has been viewed as encompassing various personal rights, protected by the Constitution against unwarranted governmental intrusion, including those activities related to marriage,[27] procreation,[28] contraception,[29] family relationships,[30] child rearing and education,[31] and most recently, the decision of a woman regarding whether to terminate a pregnancy.[32] The basis of the

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[27] *Loving v. Virginia,* 388 U.S. 1 (1967).

[28] *Skinner v. Oklahoma,* 316 U.S. 535 (1942).

[29] *Griswold v. Connecticut,* 381 U.S. 479 (1965); *Eisenstadt v. Baird,* 405 U.S. 438 (1972).

[30] *Prince v. Massachusetts,* 321 U.S. 158 (1944).

[31] *Pierce v. Society of Sisters,* 268 U.S. 510 (1925); *Meyer v. Nebraska,* 262 U.S. 390 (1923).

[32] *Roe v. Wade,* 410 U.S. 113 (1973).

right to privacy in this Court concerns the most elementary and basic right of citizens to be free from unwarranted inquiry into their personal lives. In *Roe v. Wade,* 410 U.S. 113 (1973), this Court stated:

> In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co. v. Botsford,* 141 U.S. 250, 251, 11 S.Ct. 1000, 1001, 35 L.Ed. 734 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. 410 U.S. at 152.

Justice Douglas, in his concurring opinion in *Roe v. Wade,* traced the right to privacy even further, finding its recognition in a line of cases restraining the government from asserting a general and unfettered power to inquire into the personal lives of citizens. 410 U.S. at 209, n.2.

This basic and fundamental right to be free from unwarranted governmental intrusion into the private affairs of citizens was reiterated by this Court recently in *Stanley v. Georgia,* 394 U.S. 557 (1969):

> [A]lso fundamental is the right to be free except in very limited circumstances, from unwarranted governmental intrusion into one's privacy. "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions

> and their sensations. *They conferred as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." Olmstead v. U.S.,* 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928). 394 U.S. at 564 (emphasis added).

Lower federal courts have applied these principles to protect citizens from governmental intrusion into their private lives by prohibiting state agencies from requiring the disclosure of medical treatment of individuals, *Roe v. Ingraham,* 480 F.2d 102 (2d Cir. 1973), and prohibiting school districts from administering a questionnaire containing highly personal inquiries about students' family life, *Merriken v. Cressman,* 364 F. Supp. 913 (E.D. Pa. 1973).[33]

The investigation into the private lives of the children and employees in the present case which is compelled by the Drew School District rule intrudes upon the rights of both parents and children to be left alone. The consequences of such investigations, however, are compounded because the inevitable result of the inquiries is public disclosure of what would otherwise be private and confidential information. Indeed, as a direct consequence of the operation of the challenged policy, the stigma of illegiti-

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[33]One of the offensive questions in *Merriken v. Cressman, supra,* included inquiry into the family composition of the students, including the reasons for the absence of one or both parents, 364 F. Supp. at 916. The fact that the inquiry in the instant case is made to the parent, rather than the child itself, does not make the intrusion any less offensive.

macy may be attached to an innocent child where no stigma may have previously existed. As the District Court in this case aptly noted, the rule "is mischievous and prejudicial, requiring those who administer the policy to 'investigate' the parental status of school employees and prospective applicants. *Where no stigma may have existed before, such inquisitions by overzealous officialdom can rapidly create it.*" 371 F. Supp. at 34 (emphasis added). In fact, the record relating to plaintiff Andrews reveals that her discharge as an employee came about as a result of such an "investigation" among her co-workers at the elementary school at which she was employed which uncovered that "she had a child." 371 F. Supp. at 30.

While the District Court's concern below with the creation of a stigma was undoubtedly directed at the stigma attaching to the discharged employee, it is equally clear that the resulting stigma may fall just as heavily—and perhaps with greater consequences—upon the child whose birth out-of-wedlock is deemed the basis for the discharge. The child's "illegitimacy," which may have been a private matter, may become public knowledge as a result of the parent's discharge or denial of employment. Indeed, in many circumstances, the child may have been totally unaware of the facts surrounding his or her birth. Thus, the stigma of illegitimacy may attach, for the first time, to a child as a direct result of the enforcement of a rule such as that under consideration here. Moreover, the information which becomes a part of the school district records may thereafter be made available to the child's own teachers and peers and may haunt him or her for the rest of his or her life.[34]

In view of the potential impact of such a stigma, it is not surprising that this Court has explicitly recognized the interests of children, as well as adults, in their reputations. *Goss v. Lopez,* 95 S.Ct. 729, 736 (1975). There can be little debate that the public proclamation of a child's illegitimacy causes grave damage to his or her reputation. Thus this Court has avoided, whenever possible, reaching a result which might attach the "stigma of bastardy" to an innocent child. *Estin v. Estin,* 334 U.S. 541 (1948). The stigma attached to illegitimacy is also reiterated throughout secular and religious writings. For example, in one treatise published in 1939, it was observed:

> The bastard, like the prostitute, thief, and beggar, belongs to that motley crowd of disreputable social types which society has generally resented, always endured. Davis, *Illegitimacy and the Social Structure,* 45 Am.J. Sociology 215 (1939), quoted in Krause, *Illegitimacy: Law and Social Policy* (1971).

The Biblical treatment of illegitimates is similarly harsh:

> A bastard shall not enter into the congregation of the Lord; even to his tenth generation shall he not enter into the congregation of the Lord. *Deuteronomy* 23:2.

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[34] *See,* Foder, *Emotional Trauma Resulting from Illegitimate Birth,* 54 ARCHIVES OF NEUROLOGY AND PSYCHIATRY 381 (1945), quoted in H. Krause, *Illegitimacy: Law and Social Policy* 263 n. 14 (1971).

A final revealing piece of evidence regarding the stigma attached to illegitimacy is the fact that at common law, imputation of illegitimacy is deemed to constitute libel *per se*. 50 Am.Jur. 2d, "Libel and Slander," §90. While more enlightened jurisdictions have attempted to lighten the burden of illegitimacy as it falls upon the innocent child, it is nonetheless clear that some stigma and disability from illegitimacy remain. This stigmatization of children which inevitably flows from the Drew School District's rule therefore operates to increase the burdens on a class of children who are innocent of any wrongdoing and who are already subjected to disabilities as a result of their parents' marital status. Such a rule runs directly counter to the cases decided by this Court in recent years which seek to relieve some of the burden of the designation of "illegitimacy."

V. THE HARMS SUFFERED BY CHILDREN AS A RESULT OF THE DREW SCHOOL DISTRICT RULE SERVE TO DEMONSTRATE THAT THE RULE VIOLATES THE RIGHTS OF THE CHILDREN TO EQUAL PROTECTION OF THE LAW

The direct harms to children which result from the Drew School District's refusal to employ any unwed mothers have been shown to implicate interests to which this Court has accorded its special protection. When viewed together, these injuries—the increased possibility that children of unwed parents will be deprived of minimal subsistence needs, will be taken from their natural families, will have their privacy invaded, and will be stigmatized by the label "illegitimate"—can and should be viewed together as resulting in a denial of equal protection of the law for out-of-wedlock children. This Court has held in case after case since *Levy v. Louisiana,* 391 U.S. 68 (1968), when illegitimate children have claimed violation of their Equal Protection rights, that discrimination against out-of-wedlock children constitutes a violation of the Equal Protection Clause.[35] The present case is merely another example of such a violation.

Reviewing the principal decisions regarding the rights of children of unwed parents, this Court has stated their plain meaning to be that "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." *Gomez v. Perez,* 409 U.S. 535, 538 (1973). The present case, in which the rights of such children are directly and inescapably at stake, should be decided in light of this unequivocal line of decisions in this Court reaffirming the principle that

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[35] *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164 (1972) (statutory scheme denying equal workman's compensation recovery rights to dependent unacknowledged illegitimate children violated Equal Protection Clause); *New Jersey Welfare Rights Organization v. Cahill,* 411 U.S. 619 (1973) (state program of "Assistance to Families of Working Poor" which in practical effect denied to illegitimate children benefits granted to legitimate children violated Equal Protection Clause); *Gomez v. Perez,* 409 U.S. 535 (1973) (where state creates judicially enforceable right of children to seek needed support from natural fathers, equal protection is violated if such an essential right is denied to illegitimate children); *Jiminez v. Weinberger,* 417 U.S. 628 (1974) (statutory bar to disability benefits for illegitimate children born after onset of disability contravenes equal protection provisions of Due Process Clause). *See, Stanley v. Illinois,* 405 U.S. 645, 657 (1972); *but see, Labine v. Vincent,* 401 U.S. 532 (1971).

"imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164, 175 (1972). In spite of the fact that it is mothers who are the targets of the Drew School District rule in this case, it is the existence of their children which calls into effect the operation of the rule, and it is the resulting harm to their children which this Court should recognize in holding that the rule is unconstitutional.[36]

In addition to the cases decided by this Court concerning "illegitimacy," a recent case dealing with the employment rights of mothers is also directly relevant. In *Phillips v. Martin-Marietta Corp.,* 400 U.S. 542 (1971), this Court held in effect that a company rule which barred from employment women with children, violated Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000(e)) unless the company could actually prove that the mere fact that a woman

[36]Commentators have discussed at great length the correct equal protection standard to be applied with regard to the "illegitimacy" cases, but such a discussion is outside the purpose of this brief. Suffice it to say here that the equal protection standard which has been applied by this Court in these cases is somewhat more stringent than is found in the traditional "rational relationship" test standard. Nevertheless, even applying the more lenient "rational relationship" standard here, it is apparent that the Drew School District rule has created, in the children who are the concern of *Amicus,* an irrational classification which cannot be permitted to stand. Discussions of the applicable equal protection standards are found, for example, in: *Note, Legislative Purpose, Rationality and Equal Protection,* 82 Yale L.J., 123 (1972); Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine On a Changing Court; A Model For a Newer Equal Protection,* 86 Harv. L.Rev. 1 (1972); Note, *Illegitimacy and Equal Protection,* 49 N.Y.U. L.Rev. 479 (1974).

had a child was somehow significantly job-related. Other than the fact that the mothers under consideration in the present case are unmarried, this case is indistinguishable from *Phillips.* Moreover, in the present case, the Drew School District has already had a full opportunity to prove to the District Court below that the fact that the mothers are unmarried is significantly job-related, but it has been unable to do so. Thus, even though this action was not brought pursuant to Title VII, the policy of that statute, as interpreted in the *Phillips* case, has quite evidently been violated by the rule under consideration in the present action. Unless this Court were to hold that "illegitimacy", as a matter of law, distinguishes this case from the *Phillips* decision, the holding in that case provides ample guidance for the Court's determination here.

Amicus acknowledges that this case can be decided without reaching any direct conclusions of law concerning illegitimate children. The interests of Respondents' children could not be brought directly before the courts in this case, but *Amicus* has emphasized the impact of Petitioner's rule upon them so that this Court will reach its decision with full cognizance of the broader considerations involved in weighing the lawfulness of employment discrimination against unwed mothers. Out-of-wedlock children are not respondents here, but the ability of their mothers to support them free of any taint or injury stemming from the marital status of their parents is directly at issue here. As Justice Powell so eloquently stated for this Court in *Weber,*

> Courts are powerless to prevent the social opprobium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise. 406 U.S. at 175-176.

This case presents this Court with another discriminatory and irrational classification, based upon status of birth, which constitutes a grave threat to the lives of millions of children.

CONCLUSION

For the above stated reasons, and for those stated in the brief of Respondents, the decision of the Court of Appeals for the Fifth Circuit should be affirmed.

Dated, San Francisco, California,
December 22, 1975.

Respectfully submitted,

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